Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-299

FONTANA AVIATION, INC., A MICHIGAN CORPORATION,
Petitioner,

vs.

ROBERT BALDINELLI, RUDY LUNDHOLM, AVIS RENT A CAR SYSTEM, A DELAWARE CORPORATION, AND THE HERTZ CORPORATION, A DELAWARE CORPORATION,
Respondents.

BRIEF OF RESPONDENT, AVIS RENT A CAR SYSTEM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT, AVIS RENT A CAR SYSTEM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Avis Rent A Car System, opposes the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 575 F. 2d 1194 (1978). The opinion of the District Court for the Western District of Michigan, Northern Division, is reported at 418 F. Supp. 464 (1976). Both opinions are printed in Appendix A to the Petition.

JURISDICTION.

Respondent does not question this Court's jurisdiction, as set forth in the Petition.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW.

The Petition does not correctly set forth the legal issue sought to be reviewed. That issue has nothing to do with "announcement" of a conspiracy, as petitioner now claims for the first time. Rather, the correct issue is whether a civil antitrust suit, alleging a conspiracy among respondents to terminate an oral license arrangement with petitioner, is barred by the four year statute of limitations, where petitioner admitted that the termination occurred, with its full knowledge, on May 3, 1969, but suit was not commenced until July 2, 1973?

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Section 4(B) of the Clayton Act, 15 U. S. C. § 15(b). The foregoing statutes are printed in Appendix B to the Petition.

COUNTER-STATEMENT OF THE CASE.

Petitioner (hereinafter "Fontana") ignores the allegations of its own complaint and seeks to allege a cause of action in this Court which it never pleaded below.

In the trial court, Fontana claimed to have held the exclusive right to all concessions at Ford Airport in Iron Mountain, Michigan, for a period ending in 1975 (112a-115a).* It alleged

* References to ". . . a" are to the Supplemental Joint Appendix which respondents Avis and Hertz found necessary to file in the Court of Appeals, because Fontana, appellant in that court, failed

(Footnote continued on next page.)

that it entered into oral agreements with Robert Baldinelli and Rudy Lundholm, two local businessmen who were, respectively, the local licensees of respondents Avis and Hertz. Fontana did not allege that it had any contract or other relationship with Avis or Hertz, neither of which had any business dealings with it (2a-4a).

The agreements which Fontana had with the two licensees provided that they would pay to Fontana 20% of all time and mileage charges on each car rental which originated or terminated at Ford Airport (4a).* Half of the 20% charge was a concession fee for use of the terminal space and half was payment for Fontana's checking of cars and processing of rental agreements. The gist of Fontana's claim was that Baldinelli and Lundholm ". . . agreed not to pay any fees to Fontana and to withdraw their rental offices from Ford Airport" (4a). Fontana further alleged that such action was taken "with the knowledge, agreement, consent and participation of defendants Hertz and Avis . . ." (5a). Avis and Hertz are not otherwise alleged to have damaged petitioner.**

The car rental businesses of Baldinelli and Lundholm were minor adjuncts to other individual businesses which they conducted (and continue to conduct) in Iron Mountain.

(Footnote continued from preceding page.)

to file an appendix. Pursuant to Rule 21, respondents have requested the Clerk of the Court of Appeals to certify that portion of the record to this Court.

* Ford Airport is located in Kingsford, Michigan, which had a 1970 population of 5,276. Nearby Iron Mountain had a 1970 population of 8,702. Dickinson County had a 1970 population of 23,753. See 1970 U. S. Census.

** Avis itself had no operations in Iron Mountain or at Ford Airport. As is customary in such small communities, Avis contracted with an independent licensee to provide car rentals. Avis' sole source of revenue was a set percentage of its licensee's gross revenues. Avis' revenues were neither increased nor reduced by the expenses of its licensee.

For all of 1969 Avis received license fees from Baldinelli of *less* than $1,500.

Sometime between May 1 and 5, 1969, Baldinelli physically withdrew from the Ford Airport, taking with him a clock bearing the Avis name, his credit card machine, and all rental agreements (50a-51a, 75a-76a; Dep. R. E. Baldinelli, p. 60).* After May 5, 1969, Baldinelli refused to pay to Fontana any of the 20% fee. Baldinelli testified that he withdrew from the airport because he was dissatisfied with Fontana's service and because Fontana refused to negotiate a reduction of the 20% fee, which Baldinelli felt was too high (Dep. R. E. Baldinelli, pp. 58-60; Ex. 31). Whatever the reason for Baldinelli's withdrawal, the crucial fact is that the act of withdrawal occurred no later than May 5, 1969; that Fontana was paid nothing by Baldinelli for rentals originating from or terminating at the airport after that date; and that Fontana personnel never wrote an Avis rental agreement after that date (55a, 70a, 76a).

At about the same time, but no later than May 5, 1969, Lundholm, the Hertz licensee, removed his equipment from Ford Airport and thereafter paid nothing to Fontana for Hertz cars checked in or out of the airport (51a). Fontana personnel never prepared a Hertz rental agreement after that date (70a).

There was no secret about Baldinelli's strong feelings that he was being cheated by Fontana's insistence on receiving a 20% fee. Indeed, Joseph Fontana, Sr., the company's president in 1969, testified that Baldinelli had placed an advertisement in the May 13, 1969, *Iron Mountain News* stating he could not do any more business with Fontana and wasn't going to pay any more concession fees (54a, 72a-73a). In addition, an advertisement placed by Baldinelli appeared in the May 22, 1969, *Iron Mountain News* purporting to show the disparity between what he had paid Fontana and what licensees at other airports were paying (Dep. of R. E. Baldinelli, p. 61; Ex. 32).

The extensive discovery in this case indicates that there is no dispute as to the facts described above, and Fontana admitted that this was so.

* References to "Dep." are to deposition transcripts in the record but not reproduced in the Appendix.

The thrust of Fontana's complaint, filed four years and two months after Baldinelli and Lundholm's withdrawal, was that they conspired to *jointly withdraw from the airport*, with the knowledge and participation of Hertz and Avis (3a-4a). Fontana charged that this was a violation of Section 1 of the Sherman Act. While also using the term "monopoly" in its complaint, and referring to Section 2 of the Sherman Act, Fontana never articulated just what its Section 2 theory was or how it was injured by the claimed monopoly.

Each of the four respondents categorically denied participating, directly or indirectly, in any conspiracy or monopoly (7a-15a). Despite extensive discovery, Fontana could not point to one fact which even remotely suggested that Avis knew of—let alone suggested, consented to or participated in—the action of its licensee in a tiny town in which Avis had but a *de minimis* business interest.

Assuming that petitioner had stated a claim under the federal antitrust laws, that claim arose, if at all, on the date of the *withdrawal* by Lundholm and Baldinelli from the airport. Significantly, Fontana claimed below that the act of withdrawal itself caused it injury at that time, and that the company was injured when the licensees stopped paying commissions (71a-72a). Fontana fixed that date as May 3, 1969 (93a). Moreover, the fact of the withdrawal and the date of injury were repeatedly stipulated to in the District Court by Mr. McConnell, counsel for Fontana (and, more recently, chairman of its board as well) (46a, 69a-71a).

Shortly after the well-publicized withdrawal of the licensees, Fontana commenced a state court suit against Baldinelli for breach of contract in leaving the airport. Two and a half years later (and while the state court action was still pending) Fontana commenced this suit.

In the District Court, petitioner claimed that it could not have commenced suit within the four year period following the simultaneous withdrawal of the licensees because its damages

would have been "speculative". In fact, Fontana's officers testified on deposition that the idea of a suit did not occur to them until a discussion with its counsel in May or June, 1973, who, after hearing petitioner's theories, waited until July 2, 1973 to file a complaint. Fontana's officers gave no indication that the more than four year delay was due to any inability to assess damages. Indeed, the only reason ever suggested for such delay was that its counsel was "very busy with other things" (104a).

Faced with petitioner's claim that it should be relieved of its delay in filing suit because of the speculative nature of its damages, the District Court held that the "speculative damage" exception of the *Zenith* case did not apply. Rather this case was clearly one where petitioner's damage occurred, if at all, when the licensees withdrew: that was the damage causing act. Having failed to commence suit within the four year limitations period, Fontana's complaint was dismissed.

The Court of Appeals unanimously affirmed noting, as had the District Court, that any claimed continued use of the terminal by the licensees after their simultaneous contract cancellations did not create new causes of action. Thus, this was neither a case of continuing conspiracy nor one involving speculative damages. It involved nothing more than a claimed joint termination of oral contracts, which had clearly occurred more than four years before suit was commenced.

ARGUMENT.

1. The Lower Courts Correctly Applied the Zenith Decision to These Facts.

Both the District Court and the Court of Appeals carefully considered this Court's decision in *Zenith** and found it inapplicable to the undisputed facts of this case.

Rather than developing a new rule of law for all antitrust cases, *Zenith* created but a limited exception, and one clearly

* *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321 (1970), *reh. den.* 401 U. S. 1015 (1971).

not applicable here. Contrary to Fontana's suggestion, nothing in *Zenith* allows an antitrust plaintiff to "wait and see", selecting its own date in perpetuity for commencing suit. Precisely that point was made clear in *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F. 2d 230, 233 (6th Cir. 1974), *cert. den.* 419 U. S. 997 (1974).

> "This statute of limitations commences to run from the commission of the last overt act causing injury or damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, . . .; *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854, 955 (6th Cir. 1963). Generally, there are two means by which one can avoid the operation of the statute of limitations. One, the rule enunciated in *Zenith*, . . . provides that a plaintiff may recover damages occurring within the period of the statute of limitations that are the result of conduct occurring prior to that period, *if at the time of the conduct, those damages were speculative, uncertain or otherwise incapable of proof.*
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> *Since the above rules are in avoidance of the statute of limitations, the party seeking the benefit of them has the burden of proof* to establish them. All presumptions are against him, since his claim to exception is against the current of the law and is founded on exceptions. . . ." (Emphasis added.)

Despite Fontana's contrary suggestion, there was no impediment to its commencing suit in timely fashion and proceeding to recover damages, were it able to establish the conspiracy it claimed existed. Given the long history of business dealings between Fontana and Baldinelli and the simple arithmetic of computing the income Fontana says it lost, no insurmountable barrier of the kind envisioned by *Zenith* existed. *See, e.g., Monona Shores, Inc.* v. *United States Steel Corp.*, 374 F. Supp. 930 (D. Minn. 1973) ("It should be noted that the *Zenith* case does not require that the plaintiff have the best evidence possible of his damage, but rather only that the damages be provable"); *Southeastern Hose, Inc.* v. *Imperial-Eastman Corp.*, 1973 CCH

Trade Cases ¶ 74,479, p. 94,129 (N. D. Ga. 1973) (". . . *Zenith* does not stand for the proposition that a separate cause of action arises whenever plaintiff feels the impact of damages from the violative act. If such future damages were foreseeable at the time of the act, and could have been recovered in a lawsuit commenced at that time (or within four years thereafter), then *Zenith* implies that no new cause of action accrues. *To interpret the Court's opinion otherwise would vitiate the effectiveness of the statute of limitations as a statute of peace.")* (Emphasis added); *Wilmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, 1974-2 Trade Cases ¶ 75,292 (D. Minn. 1974).

Whether the licensees did or did not continue to use the airport terminal to meet customers is irrelevant to the issue of when Fontana's cause of action accrued. Indeed, Fontana's complaint contains no allegation that the licensees did so use the terminal. Rather, it alleges only that the two licensees conspired together to terminate their agreements with Fontana (3a-5a). It was that concerted termination upon which Fontana based its case. Clearly, that was the only *act* which Fontana claimed to have caused it damage.

Unlike *Zenith*, where this Court held the amount of damages to be incapable of proof, there were no such exceptional circumstances here. Fontana had in its own possession all of the data necessary to ascertain damages. Its officers never claimed otherwise. That its counsel was "very busy with other things" is not the kind of exceptional circumstance to which this Court intended that the *Zenith* rule apply.

2. The Decision Below Is in Harmony with Decisions In the Other Circuits.

The cases relied upon by Fontana to suggest a conflict among circuits bear no similarity to the facts here.

Twin City Sportservice, Inc. v. *Charles O. Finley & Co.*, 512 F. 2d 1264 (9th Cir. 1975), involved an antitrust challenge

to a continuing contract between the parties. Unlike this case, where the damage-causing act was the termination of a business arrangement (an act complete at the moment it occurred), *Finley* involved an attack upon a contract under which the parties had each continued to perform.

To like effect is *Imperial Point Colonnade's Condominium, Inc.* v. *Mangurean*, 549 F. 2d 1029 (5th Cir. 1977), where the court held that plaintiffs were not barred from challenging a 99 year condominium recreation lease, though it was signed more than four years before suit was filed, because defendant continued to enforce and receive benefits under the lease. The court described the case before it as one ". . . where the plaintiff and a defendant *entered* into a contract in the pre-limitations period that *continued in force into the limitations period.*" (549 F. 2d 1036) (Emphasis added).

Finley and *Imperial* are clearly governed by this Court's holding in *Hanover Shoe,** where defendant's lease-only policy, adopted in 1912, was held subject to challenge by suit commenced in 1955. This Court there noted that it was ". . . not dealing with a violation which, if it occurs at all, must occur at some specific and limited time span." As an example of such a case, the Court cited *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956), which, just as this case, involved the termination of a business relationship, an act final upon its occurrence. Rather, the lease under attack, to which plaintiff and defendant had been parties during the limitations period, constituted a continuing violation of the Sherman Act.

The Seventh Circuit has similarly read *Hanover Shoe* to mean that, in an action challenging the terms or enforcement of a contract, the limitations period begins to run when the contract is terminated, not when it is executed. *Baker* v. *F & F Investment*, 420 F. 2d 1191, at 1200 (7th Cir. 1970), *cert. den.* 400 U. S. 821 (1970).

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* *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U. S. 481, 502 n. 15 (1968).

Clearly the facts here do not fall within the line of cases cited by Fontana, and it cannot create a conflict by seeking to transform this termination case into one involving a continuing contractual relationship.

Nothing in *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F. 2d 117 (5th Cir. 1975) is inconsistent with the Sixth Circuit's decision here. The Fifth Circuit in *Poster Exchange* vacated a summary dismissal on limitations grounds and remanded solely for a determination of whether a specific *act* occurred within the limitations period so as to allow plaintiff to maintain its case. The court made clear that the mere absence of dealing between the parties during the limitations period would be an insufficient basis to escape the bar of Section 4B.

> "It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." 517 F. 2d at 128.

The court below correctly held that, under *Zenith*, the statute of limitations commenced running from commission of the last overt act—the alleged joint withdrawal. There being no speculative damage exception here, the decision below is manifestly correct.

CONCLUSION AND RELIEF.

By enacting Section 4B of the Clayton Act, Congress expressed a legislative policy that antitrust claims, like other claims in the law, must be pursued with reasonable promptness, lest defendants be confronted with old and stale claims long after the challenged events occurred. A generous period of four years is allowed in which to bring such claims.

Rather than involving any exceptional facts which might toll the limitations period, this case is the paradigm for application of the statute. Here, Fontana was admittedly fully

aware of the claimed damage causing act at the very moment it occurred. Unlike *Zenith*, Fontana was under no disability in promptly bringing suit within the limitations period.

A clear and correct line of precedent, uniform among the Courts of Appeals, holds that Fontana may not maintain this antitrust action. There is nothing unusual about this case. Certainly no reason exists for review by this Court of well-settled law which has been applied consistently among the circuits.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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